Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

No. 95-1059

In The

Supreme Court of the United States

October Term, 1995

KENNETH T. RICHEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

1. WHETHER THE PROCEDURE PROVIDED BY THE STATE OF OHIO PURSUANT TO *STATE V. MURNAHAN*, 63 OHIO ST. 3d 353, 584 N. E. 2d 1204 (1992) and OHIO RULE OF APPELLATE PROCEDURE 26(B), PRECLUDED MEANINGFUL REVIEW OF THE MERITS OF RICHEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND VIOLATED HIS RIGHT TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

2. WHETHER THE INEFFECTIVE ASSISTANCE OF PETITIONER'S PRIOR APPELLATE COUNSEL VIOLATED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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STATEMENT OF THE CASE

Petitioner was charged and convicted of setting an arson fire on June 30, 1986 in Putnam County, Ohio in which a two-year-old child died. The child was the resident of an apartment complex. The State maintained at trial that the Petitioner, in a jealous rage, set the fire to specifically cause the death of the girl that had just broken off a relationship with Petitioner whose name was Candy Barchet. Evidence in the trial indicated that the Petitioner said before the fire that he was going to torch the building, he bragged about the fire after it was over and he had threatened several people "that if he can't have her (Candy) nobody else can". The State Fire Marshall upon investigation determined that accelerants were used in the fire and that Petitioner had broken into a greenhouse across the street from the complex which had the type of accelerant that were used. The matter was tried to a three-judge panel. The defendant was convicted and sentenced to death on February 9, 1987. The Ohio Court of Appeals affirmed a conviction and death sentence on December 28, 1989. The Ohio Supreme Court affirmed the judgment of conviction and death sentence on August 12, 1992 at *State v. Richey* 64 Ohio St. 3d 353. After a Motion for Rehearing was filed and denied, Petitioner filed a Petition for Writ of Certiorari with this Court which was denied March 22, 1993. 113 S. Ct. 1592 (1993).

Petitioner was given a stay of execution by the Supreme Court of Ohio for purposes of instituting a petition for post-conviction relief, but shortly before the stay was to expire his counsel filed a notice of withdrawal. The day following the notice of withdrawal, Petitioner filed an application in the Court of Appeals for the

Third Appellate District asking to reopen his direct appeal because he was denied effective assistance of counsel. (Murnahan Motion)

Richey has filed his petition in this Court asking it to review and find unconstitutional Ohio's procedure for raising ineffective assistance of appellate counsel claims; both generally, as a violation of his constitutional right to competent counsel as afforded by the Sixth and Fourteenth Amendment and specifically as applied to his case. Petitioner filed an application under Ohio Appellate Rule 26(B) asking that the Court of Appeals reopen his direct appeal on April 5, 1994. He alleged in twenty-two (22) Assignments of Error that appellate counsel was inadequate. Of the twenty-two (22) assignments, he alleged that the first sixteen were completely missed by prior counsel, five (5) were inadequately addressed by appellate counsel, and lastly he alleged that appellate counsel intentionally withheld meritorious assignments of error, so as not to professionally embarrass another attorney. The Court of Appeals on January 4, 1995 found that the application was untimely filed and that the Defendant-Appellant's explanation for the delay failed to demonstrate good cause. Notwithstanding this finding, the Court of Appeals ruled as to each of the assignments of error finding some were waived at trial, some were precluded by settled law, and several more were merely restated of issues that had been addressed. With regard to the five that were inadequately addressed, the Court found nothing in the record that they were not thoroughly and completely argued. With regard to the conflict of interest claims, the Court of Appeals found nothing in the record but the bare unsubstantiated self-

serving allegation of his then attorney and found them insufficient as a matter of law.

The Petitioner then appealed this decision to the Ohio Supreme Court on February 15, 1995. On June 21, 1995 the Ohio Supreme Court affirmed the decision of the Court of Appeals. This Petition for a Writ of Certiorari follows.

The primary issue is whether the finality of an appellate court's decision is lost because new counsel can now think of new issues or claims that might have been raised by prior appellate counsel. The focus ought to be on whether in light of the record and the law it was reasonable for an attorney to raise the claims raised by his appellate counsel and not to raise "new" issues subsequent counsel has found. If this were not the test procedural defaults would easily be avoided in every case by self-serving affidavits and objective standards of reasonableness and prejudice set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1989) would be avoided.

1. WHETHER THE PROCEDURE PROVIDED BY THE STATE OF OHIO PURSUANT TO *STATE V. MURNAHAN*, 63 OHIO ST. 3d 353, 584 N. E. 2d 1204 (1992) and OHIO RULE OF APPELLATE PROCEDURE 26(B), PRECLUDED MEANINGFUL REVIEW OF THE MERITS OF RICHEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND VIOLATED HIS RIGHT TO DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Ohio provides an avenue for raising ineffective assistance of appellate counsel claims, but petitioner complains that Ohio has placed certain procedural

requirements on the filing of such claims. This Court has sanctioned the imposition of such procedural requirements, and there is no compelling reason to revisit the issue. *Francis v. Henderson*, 425 U.S. 536 (1976); *Engle v. Isaac*, 456 U.S. 107 (1982); *Michael v. Louisiana*, 350 U.S. 91, 97 (1955); see also, *State v. Carter*, 70 Ohio St. 3d 642, 640 N.E. 2d 811 (Ohio 1994), *cert. denied*, 115 S. Ct. 1328 (1995) (Carter argued that he could not timely file Application because he was represented by the same attorneys throughout his direct appeal and beyond the ninety-day time period).

Ohio provides two procedures for the litigation of ineffective assistance of appellate counsel claims: direct appeal to the Ohio Supreme Court, or Application for Reopening in the Court of Appeals. See *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N. E. 2d 1204 (Ohio 1992), paragraph two of the syllabus. Richey chose the latter procedure, which by Ohio Appellate Rule 26(B) required him to file his application within ninety days of the court of appeals' judgment (in this case that meant within ninety days of December 28, 1989); applicants who file after this time period must demonstrate good cause for untimely filing. Richey filed his application on April 5, 1994. Richey argues that he delayed because the same attorneys had been representing him in his appeals, and thus they could not be expected to raise their own ineffectiveness. The State of Ohio offers two answers to this claim: (a) the Ohio courts addressed the merits of his ineffective assistance of appellate counsel claims and thus Richey was not prejudiced by the courts' finding that there was no good cause to excuse the untimely filing; and (b) Richey failed

to offer a good excuse for waiting three and a half years to file his Application for Reopening.

(A) The Ohio Courts Addressed the Merits of Richey's Ineffective Assistance of Appellate Counsel Claims.

Richey blindly maintains that the court of appeals refused to address the merits of his Application for Reopening. If this were true, the court of appeals would have ended its discussion on page one of the opinion after its discussion of good cause. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 1. But the court of appeals went on to address the claims "notwithstanding the fatal procedural defect." *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 2. The court explained that of the first sixteen assignments of error "several of the issues were waived at trial, some were precluded by settled law and several [were] merely restatements of issues addressed by this court and the supreme court on appeal." *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 2. The court discussed how appellate counsel's failure to raise these claims could not constitute ineffective assistance. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 3. The court also discussed assignments of error seventeen through twenty-one and held that these claims were raised in the direct appeal, and thus there was no ineffective assistance. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 3.

The court discussed at length Richey's twenty-second assignment of error because in it Richey claimed that a

conflict of interest prevented one of his two appointed counsel from raising on appeal a thorough ineffective-assistance-of-trial-counsel claim. *State v. Richey*, Case No. 12- 87-2, Journal Entry, January 4, 1995, p. 3. The court of appeals noted that Richey's other counsel, Ms. Perry, expressly acknowledged that she was unaware of the conflict, and thus nothing prevented her from arguing the ineffective-assistance-of-trial-counsel claim more vigorously. *State v. Richey*, Case No. 12-87-2, Journal Entry, January 4, 1995, p. 3.

The Ohio Supreme Court adopted the court of appeals' reasoning with respect to these assignments of error, and the court also addressed the claims Richey added in the Ohio Supreme Court. *State v. Richey*, 73 Ohio St. 3d 523, 653 N.E. 2d 344, 345 (Ohio 1995).

(B) Richey Failed to Justify the Three and One-Half Year Delay in Raising his Ineffective Assistance of Appellate Counsel Claims.

Ohio Appellate Rule 26(B) allows for the presentation of untimely applications upon demonstration of good cause for the untimely filing. Ohio Appellate Rule 26(B)2(b). Richey does not contest the reasonableness of the ninety-day time limit for filing, see *Michael v. Louisiana*, 350 U.S. 91, 97 (1955); he argues instead that the Ohio courts incorrectly determined as a factual matter that he failed to demonstrate good cause. But as the facts surrounding Richey's delay demonstrate, the Ohio courts' conclusion is amply supported by the record.

The Putnam County Court of Appeals affirmed Richey's conviction and death sentence on December 28,

1989. Mr. Murray and Ms. Perry represented Richey in this appeal. Richey fails to explain why he did not assert the claims himself, which is not unreasonable to expect since Richey does not have a constitutional right to appointed counsel in a post-conviction proceeding. *Murray v. Giarratano*, 492 U.S. 1 (1989)

Richey had even more opportunities to raise his claims. Richey appealed to the Ohio Supreme Court and this time his counsel were Ms. Perry and Mr. Kevin Fahey. Mr. Murray, the subject of the "conflict-of-interest claim" raised in Richey's Application for Reopening, was no longer representing Richey.

After the Ohio Supreme Court affirmed Richey's conviction on August 12, 1992, Richey filed a motion for a new trial, through attorneys David C. Stebbins and Randall L. Porter. This was overruled. Then Richey filed a Petition for a Writ of Certiorari to this court with attorneys Clive A. Stafford Smith and Kevin Fahey. The petition was denied in 1993. *Richey v. Ohio*, 113 S. Ct. 1592 (1993).

On January 25, 1994, Richey's present attorneys, Paul Nemser, et al., filed a motion to appear on behalf of Richey, which the court of appeals granted on February 2, 1994. The next set of events in the case is the most interesting . On the day after Richey's Public Defenders sought to withdraw from the case, April 4, 1994, Richey miraculously filed a ten (10) page Application for Reopening, which included among other things a thirty-eight (38) page appendix containing affidavits from the Public Defenders professing their own ineffectiveness. The application had to have been prepared before the

public Defenders withdrew from the case, and Richey failed to explain why the numerous different attorneys who had represented Richey at different stages of his appeals process could not accomplish what Richey's present counsel did: prepare an Application for Reopening while the conflict-of-interest attorneys still represented Richey. In fact, in support of their application, they admit meeting with Richey's Public Defenders in December, 1993. (See App A.)

Richey fails to mention the participation of these other counsel, and he instead argues that representation by the same counsel precluded the presentation of his claims until those attorneys withdrew. Aside from the factual inaccuracy of this contention, it lacks merit as a legal proposition. In essence, petitioner's "same counsel equals automatic good cause" causes delay. By retaining the same counsel throughout his state court appeals, petitioner would be able to put off the presentation of his ineffective assistance of appellate counsel claims almost indefinitely. In fact, under petitioner's reasoning, he could have kept the same counsel to file a post-conviction petition under Ohio Revised Code 2953.21 and to represent him in the appeals therefrom. If one assumes two to three years to exhaust his post-conviction remedies (a conservative estimate), petitioner would be able to raise his ineffective assistance of appellate counsel claims five to six years after the court of appeals' judgment.

Petitioner's reasoning also would cause an enormous waste of precious judicial resources. A successful Application for Reopening results in the reinstatement of the defendant's direct appeal. If Richey had presented meritorious claims in his April 1994 Application, then all of

the litigation after the December 1989 court of appeals' judgment would have been wasted – three and a half years of wasted litigation. By requiring the defendant to file his application within ninety days of the court of appeals' judgment, Ohio Appellate Rule 26(B) strikes a reasonable balance between the defendant's rights and Ohio's interest in the speedy and economical administration of justice.

In sum, petitioner's specific question presented, whether Ohio promised a forum in which ineffective assistance of appellate counsel claims can be litigated, is answered by Ohio Appellate Rule 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E. 2d 1204 (Ohio 1992). Petitioner's real complaint is with the Ohio courts' discretionary, factual determination that he failed to justify his delay in bringing his claims. This complaint is especially meaningless in light of the fact that the Ohio courts nevertheless addressed the merits of his claims.

2. WHETHER THE INEFFECTIVE ASSISTANCE OF PETITIONER'S PRIOR APPELLATE COUNSEL VIOLATED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Defendant is alleging that he was denied the effective assistance of Appellate Counsel by focusing on six instances in which Appellate Counsel failed to act or to raise claimed errors. The first five of these instances involve assertions that Appellate Counsel failed to raise issues involving variances between indictment, bill of

particulars, the evidence, and the verdict form. The sixth involves the issue whether the defendant was prejudiced by the manner in which he waived his right to a jury trial. The Ohio Supreme Court in *State v. Campbell*, 69 Ohio St. 3d 38 (1994), set out Ohio Law regarding ineffective assistance of appellate counsel. It held:

> "Counsel need not raise all non-frivolous issues on appeal. *Jones v. Barnes*, (1983), 463 U.S. 745, 751, 103 S. Ct. 3308, 3312-2213, 77 L. Ed. 2d 987, 993. Campbell's counsel raised thirteen assignments of error in the court of appeals. Counsel could have reasonably decided they could not add twenty-six more issues without 'burying good arguments . . . in a verbal mound made up of strong and weak contentions.' 463 U.S. at 753, 103 S. Ct. at 3313, 77 L. Ed. 2d at 994. Moreover, several issues on Campbell's list were waived at trial and some were precluded by settled law. Others may have had arguable merit but are 'sufficiently problematical that the refusal to raise them cannot be assailed as an unreasonable professional judgment.' *Cunningham v. Henderson* (C.A. 2, 1984), 725 F. 2d 32, 36."

Thus, to raise a colorable claim of ineffective assistance of counsel the analysis must be based upon (1) whether the issue was raised at trial and, (2) whether the issue was precluded by settled law. Where errors are raised by counsel, appellate counsel is presumed to exercise professional judgment to avoid burying good argum ıts among weak ones.

In his application for re-opening the Court of Appeals, defendant claimed that his appellate Counsel failed to think of certain claims. However, this Court has

held that the "failure to think of claims", is not a sufficient error in professional judgment to avoid a procedural default claim. In *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558 (1982), at 133, 134; 1575 held:

> "Counsel might have overlooked or chosen to omit respondent's due process argument while pursuing other avenues of defendant. We have long recognized, however, that the **Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim**. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for procedural default." (emphasis added).

Thus, counsel has no constitutionally imposed duty to "think of" every issue.

In his first assertion, Petitioner claims he was convicted of a crime different than the crime that was charged in the bill of particulars. However a bill of particulars does not charge this defendant or any defendant with a crime. The indictment charged the defendant with aggravated murder with specific intent to kill Cynthia Collins. The bill of particulars alleged that the defendant intended to kill Candy Barchet, his ex-girlfriend and/or her lover Mike Nichols and this intent was transferred to Cynthia Collins. It must be remembered that only one person was killed and that was Cynthia Collins, a two-year-old girl. The State never claimed that Candy Barchet or Mike Nichols were killed. The petitioner was never

mislead, nor was forced to defend himself against other charges. The Supreme Court of Ohio in *State v. Richey*, 64 Ohio St. 3d 353 applied the doctrine of transferred intent to this case. Since the Ohio Supreme Court cited and applied the doctrine of transferred intent no prejudice inured to the petitioner by the claimed failure of appellate counsel to raise the issue.

His second assertion is that his appellate counsel failed to review the verdict form and its claimed divergence from the bill of particulars. However, there is no requirement that transferred intent or specific intent be listed in the verdict form. *State v. Jenkins*, 15 Ohio St. 3d 164 (1984). Furthermore, the Ohio Supreme Court did find that specific intent to kill Nichols or Barchet transferred to and applied on behalf of Cynthia Collins. Clearly, reasonable appellate counsel cannot be faulted for not challenging settled Ohio Law.

Petitioner alleges in his third assertion that appellate counsel failed to challenge a fundamental variance between the indictment and the case tried against him. However, this is clearly not the case. Defendant's trial counsel knew at all times that defendant was indicted for and being tried for specifically intending to cause the death of Cynthia Collins, transferring from his specifically intending to kill Barchet and/or Nichols. Petitioner was in no way mislead, it is difficult to see prejudice and unreasonable to expect appellate counsel to raise it.

Petitioner next alleges that appellate counsel failed to challenge the fact that the verdict was ambiguous and in violation of a unanimous verdict requirement. Essentially,

petitioner is alleging that the "and/or" language used in the bill of particulars makes the conviction defective. This Court has previously held in *Shadd v. Arizona*, 11 S. Ct. 2491 (1991) that where a state's particular way of defining a crime has a long history, or is in wide spread use, it is unlikely that a defendant will be able to demonstrate that the state has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. The Court in *Shadd* went on to hold that felony murder is a "more equivalent of pre-meditation" and a jury need not unanimously decide on one of two theories of guilt. The same applies in this case. Ohio has a long history of applying transferred intent as stated in *State v. Sowell*, 39 Ohio St. 3d 322 (1988):

> "The doctrine of transferred intent is firmly rooted an Ohio Law. See *Wareham v. State*, (1874) 25 O. S. 601. Our decision in *State v. Solomon* 66 O. S. 2d 214 remains good law and we reiterate our holding that upon purposely cause the death of another and the death as a result of a schemed designated implement, the calculated decision to kill someone other than the victim, the defendant is guilty of aggravated murder."

There is nothing in the records to show appellant had a greater, moral or legal justification for killing Candy Barchet or Mike Nichols than Cynthia Collins. It would be unreasonable to expect competent appellate counsel to fault trial counsel in this area.

Richey next asserts that prior appellate counsel failed to challenge the application of the doctrine of transferred

intent. This is not prejudice because the Supreme Court of Ohio found that the doctrine did apply and affirmed the conviction. Petitioner cannot show the outcome would have been different.

The last instance cited by a petitioner is that appellate counsel failed to challenge the trial court's instruction regarding the waiver of the defendant's right to a trial by jury. On November 12, 1986, defendant signed a written waiver to his right to a jury trial pursuant to Ohio Revised Code Section 2945.05. One month later, December 12, 1986, this waiver was discussed at a hearing on pretrial motions. The presiding judge questioned the defendant at that time as to whether he would be withdrawing his waiver. The comments made by the judge at that hearing would only serve to heighten the care that the defendant would exercise in waiving his right to a jury trial. Nowhere in the transcript or the proceedings did the court ever prohibit the withdrawal of the waiver or undermine the statutory right of the defendant to withdraw his waiver before commencement of the case. Furthermore, there is nothing in the record to indicate the defendant wanted to withdraw his jury waiver. Moreover, there is nothing in the record or raised by petitioner that the outcome would have been different had he tried this matter to a jury as opposed to a three-judge panel. It is difficult to find fault with appellate counsel for failing to claim this as error.

CONCLUSION

Ohio's procedure for challenging ineffective assistance of appellate counsel comports with the Sixth and Fourteenth Amendments of the United States Constitution. Petitioner's claims were adequately addressed and reviewed both by the Third District Court of Appeals of Ohio and the Ohio Supreme Court both procedurally and on the merits. For reasons previously stated petitioner requests the Writ should be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, v. KENNETH T. RICHEY, Defendant-Appellant.	Case No. 90-338 (Court of Appeals No. 12872) **DEATH PENALTY CASE, STAY OF EXECUTION ENDS FEBRUARY 22, 1994**

AFFIDAVIT OF KEVIN L. FAHEY, ESQ. IN SUPPORT OF AGREED TO MOTION TO EXTEND TIME WITHIN WHICH TO FILE PETITION FOR POST-CONVICTION RELIEF

I, Kevin L. Fahey, Esq. (0043726), having been duly sworn, do state under oath:

(1) I am a member of the bar of Ohio in good standing. I am an Assistant State Public Defender, and have been since February 1990.

(2) The Ohio Public Defender Commission was appointed to represent Kenneth T. Richey on the appeal of his conviction and death sentence. Assistant State Public Defenders Ken Murray and Jane P. Perry represented Mr. Richey before the Court of Appeals for the Third Judicial District, Putnam County (Court of Appeals No. 12872). Attorney Perry and I represented Mr. Richey in his direct appeal to this Court. I represented Mr. Richey is connection with his petition to the United States Supreme Court for a writ of certiorari.

(3) One factor that distinguishes Mr. Richey's case from the majority of death penalty cases in this country is that in this case guilt/innocence is a genuine issue. Mr. Richey has steadfastly maintained his innocence. He turned down several plea bargain offers prior to and during trial, which offers would have made him parole eligible after serving eleven years, four months in prison. The evidence linking Mr. Richey to the alleged arson underlying his aggravated murder charge was purely circumstantial.

(4) During the pendency of Mr. Richey's appeal in the Ohio Supreme Court, Thames Television Limited, a British television production company, came to the United States and filmed a documentary about Mr. Richey's case. The documentary concluded: that Mr. Richey had been falsely accused; that he is not guilty; that the fire which took the life of Cynthia Collins may have been accidental; and that it is a travesty that Mr. Richey received the death penalty. Among the bases for the British documentary's conclusions were the following: (a) evidence that the carpet examined for accelerants may have been contaminated, after the fire but before examination, by being left in the town garbage dump for 36 hours and then by being opened outside on a parking lot surface next to gas pumps; (b) a statement from at least one witness that the fire alarm in the Collins' apartment had been detached by someone other than Mr. Richey earlier during the night in question, while Hope Collins, the mother of the decedent, was cooking pork chops for dinner; and (c) evidence that Cynthia Collins had a history of being fascinated by fire and of playing with

matches and/or lighters. None of this evidence came out at Mr. Richey's trial.

(5) On September 22, 1993, the Ohio Public Defender Commission began the process of obtaining all public records, as well as certain non-public documents, from which evidence *dehors* the record accelerants could be obtained.

(6) The Public Defender Commission is short staffed and has an overwhelming case-load. Of the 136 persons presently on death row in Ohio, the Public Defender is involved in the representation of 92 of them. This is at a time when we have only 19 attorneys in the death penalty unit, and C.P. Sup. [K.L.J.] R. 65 requires that two attorneys be on every capital case. In order to provide our death penalty clients with adequate post-conviction representation, we have been attempting to obtain help from the private bar. In Mr. Richey's case, we began attempting to obtain help from the private bar while Mr. Richey's case was on direct appeal. Our efforts included direct appeals to several Ohio law firms and to at least one law firm in Washington, D.C.

(7) In late October 1993, we learned that the Boston law firm of Goodwin, Procter & Hoar ("GP&H") had expressed an interest in representing Mr. Richey during post-conviction proceedings.

(8) On November 30, 1993, two attorneys from GP&H – Paul E. Nemser, Esq. and David J. Apfel, Esq. – came to our offices in Columbus, Ohio and met with me and several other attorneys regarding Mr. Richey's case. On December 1, 1993, Attorney Nemser and Attorney

Apfel met with Mr. Richey, and subsequently they agreed to take on Mr. Richey's post-conviction representation.

SWORN UNDER THE PAINS AND PENALTIES OF PERJURY this 25th [K.L.J.] day of January, 1994.

/s/ Kevin L. Fahey
Kevin L. Fahey

STATE OF OHIO
COUNTY OF FRANKLIN

On the 25th day of January, 1994, before me personally appeared Kevin L. Fahey, Esq. to me known, and acknowledged that his execution of the foregoing is his free act and deed.

/s/ Dale A. Baich
Notary Public
My Commission Expires:
DALE A. BAICH –
Attorney of Law
Notary Public –
STATE OF OHIO
My Commission has no
expiration
Date. SEC. 147.03 R. C.